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No. 94-109

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NAEGELE OUTDOOR ADVERTISING, INC.,
Petitioner,

v.

CITY OF DURHAM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1984 the City of Durham passed amendments to its sign ordinance to improve safety and aesthetics. The amendments banned all new commercial billboards (off-premise signs) and required the removal of existing commercial billboards, except those along federally-assisted highways, after a grace, or "amortization" period of 5½ years, later changed to 6 years. Noncommercial billboards were not required to be removed, although they were required to conform to certain dimensional restrictions. Naegele owns billboard structures affected by this removal requirement, and has contracts with landowners to use their parcels for a single use—billboard display. The questions presented are:

1. Whether the regulation of commercial off-premise billboards violates the First Amendment because noncommercial billboards are not identically restricted.

2. Whether the amortization period avoids a taking when the billboard owner has no vested rights under North Carolina law to continue its existing use, and when a court has found the amortization period to be reasonable in light of numerous factors, including the limited nature of the contractual property interests, and the recoupment of the cost and the value of the billboard structures during the amortization period.*

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* Pursuant to Rule 29.1, the City of Durham states that it is a municipal corporation under the laws of North Carolina with no parent company or subsidiary.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

In 1984 the City of Durham passed amendments to its sign regulations to address the safety and aesthetic problem caused by distracting off-premise signs (hereinafter "billboards").* C.A. App. 57, 209. Because prior regulations restricting the location of billboards had been ineffective, the City banned all new commercial billboards, and required that existing billboards be removed by their owners after a 5½-year grace period, or "amortization" period. C.A. App. 64, 66, 205. This was later changed to six years. C.A. App. 216. Billboards having state permits that were located adjacent to interstate and federally-

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* In this brief "billboards" refers to off-premise signs, and does not encompass other signs, such as on-premise business signs.

assisted highways were exempt from removal, as were noncommercial billboards, of which there were few. C.A. App. 64, 66, 205. The ordinance regulated noncommercial signs by size and structure. Pet. App. 37a.

Approximately 65 of Petitioner Naegele's 109 billboard structures in the City are affected by the removal provision. These structures were constructed at an average cost of $2,000 per structure between 1965 and 1980.[1] They are located on parcels of land that Naegele does not own, but rather contracts with landowners to use for the single purpose of displaying billboards.[2] The leases impacted by amortization average 8.6 years, including options to extend. Pet. App. 11a. Naegele owns the signs as personal property and removes them when leases are terminated. *Id.* The contracts can be terminated by the landowners if they choose to sell or develop their land and by Naegele if government restricts their right to maintain billboards. C.A. App. 500. During the lease terms, the landowners retain the right to use their property for all purposes except billboard advertising. *Id.* The zoning on these parcels permits a wide variety of over forty uses, including substantial office, commercial, or industrial construction. C.A. App. 79, 506-522.

North Carolina law establishes that owners of existing uses have no indefinite "vested rights" with regard to such uses, and that such uses can be terminated through the use of amortization. *State v. Joyner*, 211 S.E.2d 320 (N.C. 1975), *appeal dismissed*, 422 U.S. 1002 (1975). In addition, the state legislature passed legislation in 1969 allowing the City of Durham to terminate uses through amortization. 1969 N.C. Sess. Laws, Ch. 654 § 1.

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[1] Naegele's assertion that the cost of a billboard is $40,000 is not supported by the factual stipulations. C.A. App. 79-85, 91-92, 143-149.

[2] Naegele's "leases" are easements since they do not give exclusive possession of a defined portion of land. John Bruce & James Ely, Jr., *The Law of Easements and Licenses in Land*, § 1.05 (1988).

The Durham sign amendments were challenged by the then-owner of the billboards on the grounds that they violated the First, Fifth, and Fourteenth Amendments of the Constitution. After the complaint was filed, Petitioner purchased the billboards and the company's name ("Naegele") and was substituted as plaintiff in the case.

After discovery, on cross-motions for summary judgment the district court held for the City on all claims. The court of appeals affirmed this decision in 1988 on the First Amendment issue under the authority of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 503-516 (1981). Pet. App. 23a. It held that under that decision a City may ban billboards as long as it does not impermissibly prefer commercial over noncommercial speech, which the Durham ordinance did not. It also found that the Durham ordinance was substantially similar to billboard ordinances it had upheld in *Georgia Outdoor Advertising, Inc. v. Waynesville*, 833 F.2d 43 (4th Cir. 1987) and *Major Media of the Southeast v. Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987). *Id.* Further, it found the City's interest in aesthetics to be sufficient to justify the ordinance. Pet. App. 23a-24a.

On the takings issue, however, the court of appeals remanded for further evidence in light of the *ad hoc* factual inquiries needed to evaluate a takings claim. Pet. App. 29a. In consideration of Naegele's claim that not only did the ordinance damage the billboards subject to removal (the "disputed billboards or signs") but also its "integrated business" and billboards not subject to removal, Pet. App. 26a, the court directed the district court on remand to determine what effect the ordinance would have on Naegele's integrated business at the end of the amortization period. Pet. App. 28a-29a. It advised that the unit of property to be used for this assessment should be defined by the extent Naegele markets its signs as a group. *Id.* With regard to the amortization provision, the court reaffirmed its holding in *Raleigh* that amortization

was constitutional, but found that the reasonableness of any particular amortization period could only be determined on the basis of factual evidence concerning the owner's loss. Pet. App. 30a. Accordingly, the court directed the lower court to canvass all the facts with regard to the takings claim, and suggested at least thirteen different areas of factual inquiry. Pet. App. 32a. Some of these, such as the loss of sharing revenue and the percentage and value of the disputed billboards compared to the remaining billboards, pertained to the loss in value of the integrated sign business Naegele claimed was damaged. *Id.* Most of the factual inquiries, however, such as the number of disputed billboards, whether they are economically useless, the lease terms for the land on which they are located, and their cost, life expectancy, depreciation, income during amortization, and salvage value pertained to just the disputed billboards and leases. *Id.*

After remand, given the breadth of the court of appeals' directive, the parties engaged in what may be the most extensive and detailed discovery ever conducted in a billboard amortization case. Thirty-six depositions were taken, including those of seventeen experts and tens of thousands of pages of business records were produced and summarized. The process, described by the district court as "lengthy and exhaustive," Pet. App. 5a, culminated in the parties again filing cross-motions for summary judgment. The City moved for judgment on all issues while Naegele moved for summary judgment solely on the appropriate unit of property. Following these motions, the parties agreed to an extensive set of factual stipulations and attachments totalling over one hundred pages concerning all aspects of the individual billboards' respective cost, income, depreciation, and tax information, the lease history of each individual lease, and certain data with regard to the income and value of the group of Durham metro area signs, of which the disputed billboards were a part. *See* C.A. App. 74-156 for a portion of these stipulations. Some of the stipulations were limited in use to the par-

ties' respective cross-motions for summary judgment, while others were unlimited. Pet. App. 8a, n.2.

The district court used these stipulations as a basis for again granting summary judgment for the City on all issues. The court followed the approach suggested by the court of appeals. With regard to Naegele's claim of loss to its integrated sign business, it determined the appropriate unit was the group of signs Naegele consistently marketed as a group to advertisers 98% of the time. Pet. App. 8a-10a. This unit, the "Durham metro market" consisted of 232 sign faces, 106 of which would be removed after the amortization period. The court reviewed certain stipulations concerning the relative value and income of the signs that would be removed within this unit, and those that would remain, in particular the fact that Naegele would lose only 29.75% of its income capacity after expiration of the amortization period. Pet. App. 15a. With regard to the reasonableness of the amortization period, the court analyzed not the signs in the Durham metro market, but rather the stipulations concerning just the disputed billboards and their associated leases and the income earned during the period from just the disputed billboards. Pet. App. 11a-13a, "Number of Billboards that are Economically Useless" through "Salvage Value of Unusable Billboards". Based on these facts, the court concluded that the amortization period was in fact reasonable, finding in part:

> Naegele received $1,707,559.18 from the disputed signs during the amortization period. Naegele has benefited from income it earned from the disputed signs for two additional years while this litigation has been pending. The revenue Naegele earned from the disputed signs between 1984 and 1989 far outweighs the estimated original construction cost of $130,435.00, the removal cost of $84,677.31, and the replacement cost of $428,136.00. Naegele also has received nearly twice the 1984 FMV of the disputed signs during the amortization period. Because

> the leases contain a termination clause, Naegele will not suffer any loss because of continued liability on its leases.

Pet. App. 17a.

The court also utilized the stipulated facts to apply the three-factor taking analysis articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). It determined that the economic impact of the ordinance was not severe, both because the reduction in the sign revenue from the Durham metro unit would not be substantial after removal of the disputed billboards, and because the amortization income from just the disputed billboards had allowed Naegele to recover twice the 1984 fair market value of those billboards. Pet. App. 17a-18a. It concluded that Naegele's reasonable investment-backed expectations were not frustrated because Naegele had bought the signs with knowledge of the ordinance, and because the amortization period allowed Naegele the use of the disputed signs for 6 years of their average 8.6 year lease period. Pet. App. 19a-20a. It also found that the character of the government action was regulatory and did not result in a physical invasion of Naegele's property. Pet. App. 20a. The Court of Appeals affirmed the district court's opinion in an unpublished opinion that adopted the reasoning of the district court.

SUMMARY OF ARGUMENT

Neither of the issues Naegele presents meets this Court's standards for granting certiorari, and neither raises any Constitutional issues of "great theoretical and practical importance" that are causing confusion amongst the lower federal courts or state courts. The First Amendment issue—whether restrictions on commercial billboards are invalid if they do not identically restrict noncommercial billboards—has not caused any split of opinion amongst the courts applying *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981), in which this court

held that commercial off-site billboards can constitutionally be banned. The courts have had difficulty in applying *Metromedia*, but the inconsistencies in decisions have concerned issues not raised by this case. The sole support Naegele offers for its interpretation that distinctions may not be drawn between commercial and noncommercial speech is *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). Naegele interprets that decision too expansively, however, ignoring language limiting the decision to the facts of that case. *Discovery Network* did not hold that government may never distinguish commercial and noncommercial speech, nor did the case establish new constitutional protections for commercial speech. Rather, the court applied the existing test used in evaluating restrictions on commercial speech, the same test applied in *Metromedia* twelve years earlier. The court found that Cincinnati's ordinance did not meet a crucial element of this test—whether there was a "fit" between the government's goal and the means used to reach this goal—because the ordinance would eliminate a mere 62 of 2,000 offending newsracks. In this case, in contrast, the lower courts have determined that this fit exists, and that the ordinance advances its goal of eliminating most billboards on local roadways. Therefore, there is no inconsistency between the result below and *Discovery Network*, and no reason to either grant certiorari or remand this case.

On the taking issue, the determination that the Durham ordinance is not a taking is well within the mainstream of judicial precedent in this area. Stripped of the contested "unit of property" analysis, the district court's decision is a typical fact-intensive, fact-bound amortization analysis that upholds the termination of the commercial use of Naegele's billboards after a generous amortization period. The amortization of utilities, industrial uses, or newspaper companies is not an issue here. The decision is supported by more detailed findings on the nature of Naegele's property interests and the economic value of

the amortization period than is usual in amortization cases. Both the result and the amortization analysis are consistent with over fifty years of precedent from the overwhelming majority of states and from all federal courts that have considered amortization, especially as applied to billboards.

The unit of property determination, although correct and supported by precedent, is irrelevant and unnecessary to the holding that there was no taking. It was used solely to assess the impact the ordinance would have *after the expiration of the amortization period,* an irrelevant inquiry neither consistent with amortization or Supreme Court precedent. The analysis concerning the reasonableness of the amortization period independently supports the outcome below. That analysis was conducted by comparing the length and the economic benefit of the amortization period to various characteristics—cost, value, depreciation status, leasehold terms—of just the disputed signs and leaseholds Naegele suggests are the unit. In other words, the court, without explicit acknowledgment, used Naegele's preferred unit in its analysis of economic impact. However, it applied an *amortization* analysis to that unit which Naegele contests in light of its theory that its time-limited, terminable contracts and single-purpose trade structures cannot constitutionally be amortized. The only support Naegele offers for this theory is a handful of state decisions in which amortization was rejected based on interpretations of state constitutions.

In short, there is no reason for this Court to grant certiorari to review the well-supported taking decision of the district court, unless this Court wishes to entertain Naegele's novel constitutional theories and do away with over half a century of established law upholding local government's right to phase out unsightly billboards after a reasonable amortization period.

Finally, even if Naegele's characterization of the important and unresolved nature of the issues in this case

were accurate, this case is not an appropriate vehicle to resolve these issues. The factual record on the First Amendment issue is limited. In addition, the ultimate taking issue Naegele poses cannot be reached because of limitations on the factual stipulations on which the district court based its decision. And the final decision on the taking issue is merely an unpublished memorandum opinion of the court of appeals affirming a district court opinion, which, in light of its fact-bound context, will have limited precedential value for other courts.

REASONS FOR DENYING THE PETITION

I. THE FIRST AMENDMENT HOLDING BELOW DOES NOT CONFLICT WITH DECISIONS OF THE OTHER FEDERAL APPELLATE COURTS OR WITH THIS COURT'S DECISION IN DISCOVERY NETWORK

Although lower court decisions under *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) have not been uniform, they have not diverged over the central First Amendment issue raised by this case—whether a city must restrict commercial billboards and noncommercial billboards identically. No federal appellate court decision has held that cities must adopt identical regulations for commercial and noncommercial billboards. The heart of the conflict after *Metromedia* is whether ordinances similar to San Diego's are overinclusive and unconstitutionally prohibit too much noncommercial speech. There has been no conflict over sign regulations like Durham's which, acknowledging the protected status of noncommercial speech under the plurality's opinion in *Metromedia*, protect such speech at the risk of being slightly underinclusive.

Although *Metromedia* may have produced a confused welter of opinions, there were areas of agreement that allowed government to proceed with some confidence in certain areas of sign regulation. Thus, as the district court noted in its thorough analysis of the First Amendment

issues in 1987, Pet. App. 40a-50a, and as this Court has just recently noted, seven justices clearly held that a city's interest in avoiding visual clutter is sufficient to justify a prohibition of off-site commercial billboards. *City of Ladue v. Gilleo,* 114 S. Ct. 2038, 2043 (1994). The same justices also held that such billboards could be banned even though on-site commercial signs are allowed. *Metromedia,* 453 U.S. at 511, 552, 562, 570.

The split in opinions in *Metromedia* concerned the degree to which a sign ordinance must protect noncommercial speech. Stressing that Supreme Court cases have consistently accorded noncommercial speech more protection than commercial speech, *id.* at 504-509, the plurality held that the challenged ordinance violated the First Amendment because it allowed on-premise commercial business signs but did not allow similar noncommercial signs. *Id.* at 512-514. Justices Stevens, Rehnquist, and Burger issued separate dissenting opinions. All agreed that, despite its effect on noncommercial signs, the ordinance was constitutional, in large part because it did not discriminate against any particular point of view. *Id.* at 552-53 (Stevens, J., dissenting in part), 562 (Burger, C.J., dissenting), 570 (Rehnquist, J., dissenting). As this district court found below, *Metromedia* "taken as a whole, thus stands for the proposition that a city may distinguish commercial and noncommercial signs, and may ban off-site commercial signs entirely." Pet. App. 43a.

The lower court opinions since *Metromedia* have mirrored the *Metromedia* split over the degree to which sign ordinances must protect noncommercial speech. Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions,* 88 Mich. L. Rev. 2482, 2500-2507 (1990). The majority of courts have followed the plurality's approach and have invalidated ordinances that allow on-site business signs but do not allow noncommercial signs in the same place. *See National Advertising Co. v.*

Town of Niagara, 942 F.2d 145, 147 and 151 (2d Cir. 1991); *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 554-557 (2d Cir.), *cert. denied*, 498 U.S. 852 (1990); *Ackerley Communications, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988); *see also Dimitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993). A second group of decisions, also relying on the plurality opinion, has upheld ordinances like Durham's that "fix" the problem identified in *Metromedia* by allowing signs with any noncommercial message either everywhere or as a substitute for on-premise business signs. *See National Advertising Co. v. City and County of Denver*, 912 F.2d 405, 410 (10th Cir. 1990); *Georgia Outdoor v. Waynesville*, 833 F.2d 43, 46 (4th Cir. 1987); *Major Media of the Southeast v. Raleigh, supra*. On the other hand, some courts, primarily in the sixth circuit, following the approach of the three dissenters, have upheld ordinances that substantially limit certain types of noncommercial signs, such as political signs. The ordinances in those cases allowed on-premise business signs and noncommercial signs related to an on-premise activity. The opinions reasoned that despite prohibiting significant noncommercial speech the ordinances were even-handed in their treatment of commercial and noncommercial speech and were viewpoint neutral. *Messer v. Douglasville*, 975 F.2d 1505, 1509-1510, 1513 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993); *Rzadkowolski v. Village of Lake Orion*, 845 F.2d 653, 654-655 (6th Cir. 1988); *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 592-594 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988).

The direct inconsistencies between these decisions are thus between those cases invalidating ordinances like San Diego's in reliance on the plurality opinion that they don't protect noncommercial speech enough and those upholding very similar ordinances as "viewpoint neutral"

for the reasons given by the three dissenters. *Note, supra,* 88 Mich. L. Rev. at 2500-2507. Because the courts' main concern under *Metromedia* has been *protection* of commercial speech, no decision has held that noncommercial speech must be regulated as strictly as commercial speech, or has invalidated an ordinance like Durham's that attempts to fix the problems identified in *Metromedia* by allowing noncommercial signs to continue to exist. *Id.* at 2511-2514. Although the approach of allowing noncommercial billboards while disallowing commercial billboards may present certain problems, it may be "best of all solutions for a compromise," especially if, as in Durham's ordinance, noncommercial signs must conform to certain regulations. *Id.* at 2515.

The two cases which Naegele contends conflict with the holdings below are not in conflict. The first, *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), concerned a sign ordinance that discriminated against political signs, unlike the Durham ordinance in this case. In striking down the ordinance the court issued three separate opinions. *Id.* at 1047, 1079, 1080. Much of the majority opinion is *dicta*. The actual result in *Rappa*, invalidation of an ordinance that prohibited political advertising, *id.* at 1079, is consistent with the result in the instant case. The second case, *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993) upheld two ordinances remarkably similar to Durham's that allowed noncommercial advertising to be substituted for permissible commercial advertising. The court specifically discussed *Discovery Network*, finding that it had not overruled *Metromedia*, and had not established a new test for protection of commercial speech. *Id.* at 610. Notwithstanding this conclusion, the court, because of the "principle enunciated in *Discovery Network*," interpreted the ordinances to allow noncommercial signage only for on-site signs, not for off-site billboards. *Id.* at 611. There is thus some inconsistency in judicial interpretation of the

Outdoor Systems ordinances and Durham's ordinance. Significantly, however, the court in *Outdoor Systems* did not hold that the ordinances at issue would be unconstitutional if interpreted like Durham's. It merely interpreted the ordinances to avoid a possible conflict with *Discovery Network*. The result thus does not directly conflict with this decision, certainly not to the degree that would warrant granting certiorari in this case.

In summary, no federal appellate court has invalidated a billboard ordinance because it does not restrict noncommercial billboards in an identical manner as commercial billboards. If the Supreme Court wishes to resolve some of the confusion that exists concerning *Metromedia*, granting certiorari in a case involving a sign ordinance which is arguably overinclusive and regulates too much noncommercial speech will accomplish this purpose. Granting certiorari in this case will not.

The lower court's decision also does not conflict with this court's decision in *Discovery Network*. *Discovery Network* did not, as Naegele interprets, establish new protections for commercial speech or inaugurate an era in which ordinances which distinguish between commercial and noncommercial billboards are presumed to be unconstitutional. In fact, the majority specifically declined, 113 S. Ct. at 1510 & n.11, over the sole objection of Justice Blackmun, *id.* at 1517, 1521, to adopt the more protective test for commercial speech that the court of appeals had adopted. Rather, the majority applied the same commercial speech test, first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), that the court applied in *Metromedia* in concluding that commercial off-premise billboards could be banned. *Discovery Network*, 113 S. Ct. at 1510. Application of that test led to invalidation of Cincinnati's newsrack ordinance because there was no fit between Cincinnati's goals and the regulation of only 62 newsracks. *Id.*

The court in *Discovery Network* invalidated an ordinance that regulated only 62 newsracks dispensing "commercial" publications out of a total of 1,500 to 2,000 offending newsracks. *Id.* Applying the four-part *Central Hudson* test as revised in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), the court concluded that in light of the history of the ordinance and the "paltry" and "minute" impact of regulating such a small number of newsracks there was not a "reasonable fit" between the challenged ordinance and the city's safety and aesthetics goals. 113 S. Ct. at 1510. The court explicitly cautioned that

> Our holding, however, is narrow . . . [W]e do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing.

Id. at 1516.

If applied to billboards[3] the decision should not be interpreted expansively, or the result will certainly be the Hobson's choice described by Chief Justice Rehnquist in his cogent dissent, in which Justices White and Thomas joined: communities would either prohibit all speech, both commercial and noncommercial, or give up, and not regulate at all. *Id.* at 1525 (Rehnquist, C.J., dissenting).

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[3] It is debatable whether *Discovery Network* should be applied to billboards at all, given this Court's admonitions that "each method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses, and dangers for each method." *Metromedia*, 453 U.S. at 501, *quoting Kovacs v. Cooper*, 336 U.S. 77, 97 (1949). Billboards are a distinctly different medium than other speech, as the court recognized in *Metromedia*, 453 U.S. at 501. The "secondary effects" of billboards, in particular the forced visual intrusion on highway users and highway safety hazards they present, do not exist for newspapers and other print media.

The Court's recent holding in *City of Ladue v. Gilleo, supra*, indicates that *Discovery Network* should not be read as Naegele suggests. In *Gilleo*, the court did not consider the challenged ordinance to be presumptively unconstitutional even though there were content-based exemptions in the ordinance that favored certain types of signs. 114 S. Ct. at 2044. Rather, it assumed that the ordinance was viewpoint-neutral and analyzed it accordingly. *Id.* In holding that the City of Ladue could not prohibit residential political signs, the court specifically noted that its holding did not encompass residential signs of other types, such as off-site commercial signs. *Id.* at n.17. *Gilleo* confirms that the Court recognizes the importance of offering special protection to noncommercial speech, consistent with the opinion of the plurality in *Metromedi*a, 453 U.S. at 511-515.

Assuming, *arguendo*, that *Discovery Network* applies to billboards, then it is reasonably interpreted to require that the "fit" be shown that was not present in that case. In this case, the lower courts have found such a fit. Pet. App. 40a, 44a, 49a-51a. In addition, if, *arguendo*, *Discovery Network* imposes a new requirement that a neutral justification be shown for regulating just commercial billboards, that justification exists here. In *Discovery Network* Cincinnati presented a "weak" justification, rejected by both lower courts, that commercial newsracks could be distinguished from noncommercial newsracks because they proliferated. 113 S. Ct. at 1514-1515, 1517. In contrast, in this case the district court in 1987 found that the City's argument that commercial billboards had proliferated, and were in fact, the problem, was supported by evidence that noncommercial advertising could not support the continued maintenance of billboards by Naegele. Pet. App. 40a, 49a-51a. In other words, Durham's argument concerning proliferation has been examined, and accepted. The district court's conclusion in 1987 has since been buttressed by stipulations showing that noncommercial use of billboards is infre-

quent and incidental, comprising only 2% of Naegele's advertising, and by Naegele's stipulation that it cannot support its business through noncommercial advertising. Pet. App. 11a; C.A. App. 24-25, 38, 89. The "fit" that was lacking in *Discovery Network* is clearly present here and has already been analyzed by the courts below.

Even if Naegele is correct that *Metromedia* and *Discovery Network* need reconciliation, the factual record below prevents this case from being an appropriate vehicle to provide it. The court's First Amendment decisions are generally narrow and fact-specific, and a well-developed factual record is important. This is true especially for review of sign regulations, given the complexity of typical municipal sign codes. In this case, however, the record on First Amendment issues contains no factual stipulations or evidence concerning application of the ordinance. It is also not current since the decision on the First Amendment issue was issued in 1988, and discovery on that issue completed in 1986. Since then two comprehensive revisions of the sign code were passed in 1988 and 1994.[4] Both carry forward the commercial/noncommercial distinction in the 1984 code, but clarify certain definitions, restrictions applicable to noncommercial signs, and administrative appeal routes. Assuming, *arguendo*, that Naegele's characterization of the unresolved issues in this case is accurate, clearly a case involving a sign code unaltered by subsequent amendments, with either adequate factual stipulations or evidence of its application, would be a more appropriate vehicle for consideration.

Finally, this case should not be remanded to the Fourth Circuit for reconsideration under *Discovery Network*, as Petitioner suggests. As noted, *Discovery Network* did not establish a new test to be applied to restrictions on commercial speech, but was merely an application expressly limited to the facts of that case of the same commercial

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[4] The 1988 revision is reprinted at Pet. App. 62a-91a. However, this code was not the subject of the lower courts' analyses in 1987 and 1988. The 1994 code is not a part of this record.

speech test that existed when this case was first decided. The lower courts in this case, before *Discovery Network* was decided, analyzed the "fit" that was deemed lacking in that case, and determined that such fit was present. Naegele presented thorough arguments concerning the application of *Discovery Network* to the court of appeals in three motions and a petition for reconsideration, and called the court's attention in oral argument to the case. At the time of its decision on the taking issue in 1993, the court of appeals was clearly aware of *Discovery Network*, but did not consider that it would change the outcome of its 1988 decision. Remanding this case for the court of appeals to merely repeat the analysis already conducted by the district court in 1987 will extend Naegle's immunity from compliance with the ordinance beyond the four additional years it has already had, unnecessarily prolong this endless litigation, and further increase its astronomical costs.

II. THE COURT'S CONCLUSION THAT THE AMORTIZATION PERIOD WAS REASONABLE, WHICH WAS DETERMINED WITHOUT UTILIZING THE UNIT OF PROPERTY NAEGELE CONTESTS, INDEPENDENTLY SUPPORTS THE HOLDING BELOW THAT THERE WAS NO TAKING

Petitioner complains that the court erroneously assessed the economic impact of the ordinance on a "unit" consisting of all of its signs in the Durham market area, rather than just the billboards and leaseholds subject to amortization, and that this determination fixed the outcome of the case. Petitioner is wrong. The district court conducted two analyses of economic impact and concluded the ordinance was not an unconstitutional taking based on two grounds: (1) because it contained an amortization period which the court determined was reasonable in light of the nature and extent of Petitioner's property interests in its individual billboards and associated leases, and the economic benefit the amortization period afforded Petitioner, Pet. App. 16a-20a; and (2) because the impact

on Petitioner's business unit at the end of the amortization period was not severe, in light of Petitioner's other sign holdings. Pet. App. 18a. For the first holding, without ever acknowledging it was doing so, the court used as a unit just the disputed billboards and leaseholds, and conducted one of the most thorough and detailed evaluations of the facts concerning these billboards and leaseholds to be found in a reported billboard amortization case. Pet. App. 11a-13a, 16a-20a.[5] For the second holding, the district court used as a unit the billboards in the Durham metro area, the unit that Petitioner now contests. Pet. App. 7a-10a. Unfortunately this unit received all of the court's analysis on the unit issue, *id.*, which gives it a significance unwarranted by the law. In fact, under well-established amortization precedent the first ground alone was sufficient to support the finding that there was no taking. Naegele essentially concedes this in its petition, recognizing that this Court must review the constitutionality of amortization in order to address the lower court's conclusion that there was no taking. Pet. 26-28.

The district court's dual analysis reflects the confused analytical approach used by the Court of Appeals in its remand in 1988 of the taking issue. The court accepted that an amortization period avoids a taking if it offers

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[5] Some confusion might exist from the heading "Relevant Aspects of Naegele's Business" which appears at the beginning of the court's discussion of the court of appeal's suggested factual inquiries. However, it is clear from the fact that the district court repeatedly referred to the "disputed signs" in the discussion that the cost, income, depreciation, and lease information being analyzed was that of just the disputed signs, i.e., those subject to amortization. The court did, for ease of discussion, aggregate the data for the disputed signs and leaseholds. However, the stipulated facts in the record below show cost, income, and lease history for each billboard and leasehold, and demonstrate that there is not a significant variation between the aggregate data for the disputed signs and leaseholds and the individual data for each sign and leasehold. C.A. App. 74-156.

the owner a chance to recoup his investment and avoid substantial loss. Pet. App. 27a. However, the court also appeared to accept Petitioner's theory that loss to its integrated business calculated at the *end* of the amortization period was relevant to the takings analysis. Pet. App. 28a-29a, 32a. This theory grew in large part from Petitioner's complaint that because of its method of marketing billboards, billboards that were part of its business unit but that were not subject to removal under the Durham ordinance would also be severely damaged by the ordinance. Pet. App. 28a. In fact, however, an analysis of economic impact that focuses on the *end* of the amortization period is neither consistent with the theory of amortization, nor with its implementation by the courts over the last fifty years.

The termination of certain types of existing uses and structures through amortization is a long-standing and widely accepted approach in zoning. It is a common solution to one of the most challenging problems in twentieth century zoning—how to eliminate uses that do not conform to current zoning requirements, which after becoming nonconformities, enjoy a competitive advantage and thus generally do not fade away.[6] An amortization ordi-

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[6] The continuing existence of structures and uses that are no longer legal is considered by many land use scholars to be the "greatest obstacle to . . . orderly development" in many communities. Reynolds, *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and Public Welfare*, 34 J. Urban and Contemp. L. 99, 100 (1988). These nonconformities prosper because of the monopoly position they enjoy as a result of the change in zoning. Comment, *The Abatement of Pre-Existing Uses Under Zoning Laws: Amortization*, 57 NW. U.L. Rev. 323 (1962). Courts have also recognized this problem. *See, e.g., City of University Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972), *appeal dismissed*, 411 U.S. 901 (1973) (upholding amortization to terminate nonconforming commercial use in residential zone); *Grant v. Mayor and City Council of Baltimore*, 129 A.2d 363, 365 (Md. 1957) (upholding five year amortization of nonconforming billboards.)

nance prohibits new uses of a given type on the date of enactment but allows existing uses to continue for a grace, or "amortization" period. This period allows the owner of the existing use to enjoy a favorable competitive position, continue to earn revenues from the now-nonconforming use, make new plans, and try to conform with the new restrictions, if conformity can be achieved. Courts have generally concluded that this approach strikes a balance between property owners' rights and the community's welfare as furthered by zoning. *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255, 261 (N.Y. 1977), *app. dismissed*, 439 U.S. 809 (1978).

The vast majority of state courts and all federal appellate courts,[7] that have addressed the constitutionality of amortization have upheld it. *See* 1 Robert M. Anderson, *American Law of Zoning 3d* §§ 6.69-6.73; 4 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* § 51B.05[2] & [4]; 4A Norman Williams, Jr., *American Planning Law* (1986) §§ 116.01-116.06; Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R. 5th 391 §§ 2[a], 3[a]. In particular, the courts have recognized the validity of amortizing uses such as billboards and "open air" uses of land such as junk yards and material storage facilities. *Anderson, supra*, § 6.74; *Rathkopf, supra*, § 51.B.05[6] at 51B-62; 1 *Rathkopf, supra*, § 14A.04[4]; *Zitter, supra*, §§ 2[a], 5. These uses involve relatively small capital investments in structures or other permanent changes to the face of the land.

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[7] *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987) (upholding 5½ year amortization of billboards); *Art Neon Co. v. City and County*, 488 F.2d 118 (10th Cir. 1973) (upholding 5 year amortization of billboards); *E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 114 (5th Cir.), *cert. denied*, 400 U.S. 805 (1970) (upholding 5 year amortization of billboards); *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950) (upholding 10 year amortization of gasoline station).

The small minority of state court decisions cited by Naegele that have rejected the principle of amortization were based on interpretations of state constitutions that were held to create vested rights in owners of existing uses.[8] *See Williams, supra,* § 116.06 at 264-268. This divergence is consistent with this court's rule that property rights are defined, and limited, by state law. *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 2901 (1992); *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Clearly, the extent to which an owner of a use has a vested right to continue that use is a function of state law, and North Carolina has held that such a right is subject to amortization, if the period is reasonable. *State v. Joyner,* 211 S.E.2d 320 (N.C. 1975), *appeal dismissed,* 422 U.S. 1002 (1975); *Summey Outdoor Advertising, Inc. v. County of Henderson,* 386 S.E.2d 439 (N.C. App. 1989), *disc. rev. denied,* 392 S.E.2d 101 (N.C. 1990) (5 year amortization of advertising sign upheld); *County of Cumberland v. Eastern Federal Corp.,* 269 S.E.2d 672 (N.C. App. 1980), *disc. rev. denied,* 273 S.E.2d 453 (N.C. 1980) (3 year amortization of sign upheld).

The economic theory behind amortization focuses on the restoration of the property owner to his original position through allowing such owner to recoup the investment made in the now-prohibited use or structure. *Benners, supra,* 485 S.W.2d 773, 779 (Tex. 1972); *Grant, supra,* 129 A.2d at 369; *City of Los Angeles v.*

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[8] *Lamar Advertising of South Georgia, Inc. v. City of Albany,* 389 S.E.2d 216, 217 (Ga. 1990) (citing Georgia state constitution); *Ailes v. Decatur County Area Planning Comm'n,* 448 N.E.2d 1057, 1059 (Ind. 1983) (unconstitutional, citing prior state case law); *Hoffman v. Kinealy,* 389 S.W.2d 745, 748 (Mo. 1965) citing Missouri state constitution); *Loundsbury v. City of Keene,* 453 A.2d 1278, 1280 (N.H. 1982) (citing New Hampshire state constitution); *Pennsylvania Northwestern Distribs., Inc. v. Zoning Hearing Board,* 584 A.2d 1372, 1375 (Pa. 1991) (citing Pennsylvania state constitution).

Gage, 274 P.2d 34, 43 (Cal. Ct. App. 1954). Thus, most courts have used recoupment or near-recoupment of the original cost of a use or structure as a benchmark for measuring the adequacy of a amortization period. "A court will almost certainly uphold an amortization ordinance if all factors indicate that the prescribed period is adequate for recovery of a substantial part of the investment."[9] Reynolds, *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and the Public Welfare*, 34 J. Urb. Contemp. L. 99, 121 (1988). *See also* Note, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 Stan. L. Rev. 1325 (1977). In billboard cases, in addition, the courts have also focused on lease terms to judge the sufficiency of an amortization scheme. *Modjeska, supra*, a leading billboard amortization decision, cited the importance of five factors in determining the reasonableness of an amortization period for billboards: initial capital investment, investment realization to date, life expectancy of the investment, whether obligations continue under the lease, and whether the lease is terminable. 373 N.E.2d 255, 262. This approach has ben followed in numerous billboard amortization decisions.[10]

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[9] In emphasizing "recoupment of investment," courts have rejected the proposition that the amortization period must recoup the fair market value of the signs. *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 942 (Tex. Civ. App. 1978), *cert. denied*, 444 U.S. 833 (1979) (the focus on initial capital investment "necessarily precludes recoupment or removery of the market value"). Nor have they required that the signs have no value at the end of the amortization period. *Art Neon Co. v. City and County of Denver*, 488 F.2d 118, 121 (10th Cir. 1978).

[10] *See, e.g., Suffolk Outdoor Advertising Co., Inc. v. Town of Southhampton*, 45 N.E.2d 1245, 1247-48 (N.Y. 1983) (3 year amortization period upheld where sign owners had fully recouped their investments, substantially depreciated their billboards for income tax purposes, had relatively insubstantial lease obligations, and,

Using standards such as recoupment of investment, lease terms, and rate of depreciation claimed under tax law, courts have upheld the overwhelming majority of ordinances amortizing billboards. 1 *Rathkopf, supra*, § 14A.04[4]; 4 *Rathkopf, supra*, § 51.B05[6]; *Zitter, supra*. § 5. Most of these ordinances contained amortization periods shorter than Durham's.[11]

These decisions are consistent with Supreme Court precedent holding that trade or business uses can be terminated even without provision of an amortization period. The cases clearly recognize that *land* must enjoy permanent economic viability. *Lucas*, 112 S. Ct. at n.13; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485, 495 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). In contrast, however, the Court has not accorded the same protection to lesser property interests, and has repeatedly upheld state and local regulations that, without grace periods, destroyed the usefulness of business-related property. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding termination of quarry); *St. Louis Poster Advertising Co. v. St.*

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thus, would not incur any substantial financial loss); *Lubbock Poster Co., supra*, 569 S.W.2d 935, 941-42 (recoupment of investment is the major consideration in determining whether there is a taking and the court should look at the five *Modjeska* factors, plus removal cost. Compare the less factually complicated approach in *State of Maine v. National Advertising Co.*, 409 A.2d 1277, 1289 (Me. 1979) in which the removal of 260 billboards statewide through amortization was upheld because the owners offered no evidence that the amortization period was inadequate to recoup their investment.

[11] *Major Media of the Southeast, Inc. v. City of Raleigh, supra* (five and one-half years); *E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970), *cert. denied*, 400 U.S. 805 (1970) (five years); *Donrey Communications Co. v. City of Fayetteville*, 660 S.W.2d 900 (Ark. 1983) (four years); *Mayor and Council of New Castle v. Rollins Outdoor Advertising, Inc.*, 475 A.2d 355 (Del. 1984) (three years); *State v. Sanguinetti*, 449 A.2d 922 (Vt. 1982) (five years). *See generally* Comment, *Amortization: A Constitutional Means to Eliminate Nonconforming Municipal Signs*, 54 Ore. L. Rev. 224 (1975).

Louis, 249 U.S. 269 (1918) (upholding ordinance that destroyed usefulness of pre-existing contracts for billboards and billboard faces); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915) (upholding termination of existing brick-making operation); *Mugler v. Kansas,* 123 U.S. 623 (1887) (upholding destruction of brewery, related machinery and business property).

Recent decisions have affirmed the continuing viability of the holdings in these cases that elimination of a single use will not effect a taking. *Penn Central,* 438 U.S. at 125-127. They also have clarified that the decisions are not limited to situations in which government is eliminating a "noxious" use, but rather, extend to all proper uses of the police power. *Penn Central,* 438 U.S. at 133-34, n.30; *Lucas,* 112 S. Ct. at 2896-99.

In *Lucas* this court emphasized that an owner of personal property used for commercial purposes can have only limited expectations that the property will have indefinite economic use:

> [A] property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1992) at 413. . . . And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus v. Allard,* 444 U.S. 51 (1979).

112 S. Ct. at 2899. This restriction is clearly applicable to billboards, which have only one economically productive use, and which are unique in their parasitic relationship to the publicly-created road. Thus, opinions that have closely analyzed the property interests of billboard

owners have concluded that the interests exist entirely at the sufferance of government, and may be subject to termination without any amortization at all.[12]

In demonstrating that it was legally unnecessary for the court to determine the impact of the ordinance on Naegele's single-use interests at the end of the amortization period, the City does not concede that the court's unit of property determination was incorrect. It was merely irrelevant. However if this Court were to determine otherwise, then there is ample support for the court's method of determining the unit. Moreover, whether right or wrong, the unit determination does not meet this Court's standards for granting review.

Naegele's argument that, because North Carolina law recognizes leases and billboard structures as "property," they must be treated as individual units of property in a taking analysis misses the mark. The issue is not whether individual properties exist, but whether they should be considered separately or together for purposes of assessing economic impact in a taking claim.

The aggregation of legally distinct and sometimes physically separate properties in a single unit based on unity of use for analysis of economic impact is employed in both eminent domain cases, and regulatory taking cases. In eminent domain cases, such combination is based on the accepted principle that properties with an integrated use

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[12] In *Micalite Sign Corp. v. State Highway Department*, the Vermont Supreme Court upheld the right to remove, without any amortization period, a pre-existing sign because billboard owners were using the view from highways for commercial purposes for direct profit, similar to common carriers, and were allowed that use only as a matter of sufferance by the legislature. 236 A.2d 680, 682 (Vt. 1967), *citing Kelbro v. Myrick*, 30 A.2d 527, 531 (Vt. 1943). *See New York State Thruway Authority v. Ashely Motor Court, Inc.*, 176 N.E.2d 566, *remitter amd.*, 178 N.E.2d 232 (N.Y. 1961); *General Outdoor Advertising Co. v. Dep't of Public Works*, 193 N.E. 799, 808 (Mass. 1935), *appeal dismissed sub nom. General Outdoor Advertising Co. v. Callahan*, 296 U.S. 543 (1935), 297 U.S. 725 (1936). *See also Williams, supra*, § 119.04, § 121.06, § 121.07.

may be treated as a whole. *See, e.g., Georgia-Pacific Corp. v. United States,* 640 F.2d 328 (Ct. Cl. 1980), *United States v. Honolulu Plantation Company,* 182 F.2d 172 (9th Cir. 1950), *Baetjer v. United States,* 143 F.2d 391 (1st Cir. 1944). Eminent domain cases in North Carolina hold that three factors—unity of ownership, physical unity, and unity of use—are considered in determining a unit, with unity of use being given greatest emphasis. *Barnes v. State Highway Comm'n,* 109 S.E.2d 219 (N.C. 1959). Regulatory taking cases have also given unity of use great weight. *See, e.g., Ciampitti v.* U.S., 22 Ct. Cl. 310 (1991) (separate, noncontiguous parcels acquired over different times, some of which had already been conveyed to other owners at the time of suit, treated as single unit); *Deltona Corp. v. U.S.,* 657 F.2d 1184 (Ct. Cl. 1981) (5 separate subdivisions combined into a single unit on basis of landowner's unified planning and integrated development scheme); *Jentgen v. U.S.,* 657 F.2d 1210 (Ct. Cl. 1981) (80 acres of undevelopeable wetlands combined with 20 buildable acres over which the Corps had no jurisdiction for the unit). In these decisions, like the instant decision, defining the unit was an intensely fact-based determination, based on particular considerations of the history and use of the property at issue. *See* Pet. App. 9a, n.4.

Supreme Court precedent supports that property will not necessarily be considered as the affected unit just because it is recognized as property. Thus the court in three cases has aggregated property that state law recognized as legal "property" with other property for analysis. *Keystone, supra,* 480 U.S. at 478, 500, n.28 (aggregation of support estate with mineral estate); *Penn Central, supra,* 438 U.S. at 141 (aggregation of lessee UGB's lease with parcel as a whole, and of air rights with remainder of property, for analysis); and *Goldblatt, supra,* 469 U.S. at 593-94 (combining lessee's interest with that of owner of fee parcel for analysis.)

Granting certiorari in this case will offer little guidance in other cases. Because billboards are a unique

type of property, any principles derived from review of this case would not apply to other properties. Finally, denying certiorari will not open the flood gates for courts to find "super-units" in other taking cases. Since 1988 no other court has used the court of appeals' decision as a basis for combining other properties that were not billboards into integrated units, undoubtedly because of the largely fact-based nature of the unit-of-property determination.

In partial sum, then, whether right or wrong, the district court's unit determination was not necessary to the outcome of this case, which is independently supported by the court's analysis of the reasonableness of the amortization period. Even if, arguably, the unit determination were necessary, it is supported by precedent and does not conflict with decisions of this court, or of other appellate courts. Thus, granting certiorari will not offer guidance in an area that has split the courts. Nor, given the unique nature of billboards, and the fact-bound nature of the unit of property determination will review of this case help to establish useful parameters for the "unit of property" analysis to be employed in cases involving more typical property interests.

III. THE COURT CANNOT REACH THE ULTIMATE TAKING ISSUE NAEGELE POSES BECAUSE OF THE ABSENCE OF CRITICAL FACTS

The question Petitioner has formulated on the taking issue assumes that there is a factual finding that the billboards are valueless at the end of the amortization period. However, the district court's conclusion that the billboards are valueless is based on the parties' stipulations. The parties expressly limited the use of certain critical factual stipulations, including those pertaining to whether the affected billboards were valueless at the end of the amortization period, to the issues presented in the parties' respective motions for summary judgment. Petitioner did not move for summary judgment on the taking issue, but only on the unit issue and thus if used in favor of Peti-

tioner the stipulations as to valuelessness can be used only for deciding the unit issue.

The factual stipulations on which the district court based its grant of summary judgment consist of two parts: Part A, facts stipulated for all purposes, and Part B, facts stipulated only for purposes of the parties' respective motions for summary judgment. Pet. App. 8a, n.2. The Part B stipulations include various stipulations that Naegele cannot practically re-use its amortized billboards in other locations. C.A. App. 89. The City agreed to these stipulations, despite evidence that the billboards could be re-used, because of the express restriction that the Part B stipulations could be used only for the parties' respective motions for summary judgment. The stipulations regarding value at the end of the amortization period were thus available for consideration against the City on the City's motion that there was no taking, but were not available for consideration in Petitioner's favor on whether there was a taking since the Petitioner had not requested summary judgment on this issue. This court is similarly limited in its use of these stipulations, and thus the "ultimate issue" that the ordinance is a taking presented by Petitioner in its second question cannot be decided on the basis of the factual record before the court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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